IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 165 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAINUDDIN @ DILO AMIRBHAI ANSARI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 165 of 1999
MR NB TIWARI for Petitioner No. 1
MR IM PANDYA, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 17/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE A.L.DAVE)

1. This appeal arises out a judgment and order rendered by learned Additional City Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No.268 of 1997, on 23rd December, 1998, recording conviction of the appellant under Section 8(C) read with Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and sentencing him to undergo rigorous imprisonment for a period of 11 years and to pay a fine of Rs.1 lakh, and, in default, to undergo further rigorous imprisonment for one year.

2. The prosecution case is that, on 21st August, 1997, at about 10.30 hours, P.W. No.2-Tarunkumar Amratlal Barot (Ex.13), while he was Police Inspector, D.C.B. Crime Branch, Ahmedabad, received an information through Police Head Constable-Gopalsing Nathusingh and Abdul Majid that one Jainuddin alias Dilo Ansari, resident of Vatwa, is to go to one Govindsinh Rajput, staying near Khodiyarnagar Chhapra with a quantity of charas. P.W.2, therefore, directed Constable-Abdul Majid to summon Panch witnesses and sent an intimation to his superior officer in writing by confidential outward No.100/97 T.A.B. and kept the office copy along with the case papers. The said communication was prepared in the hands of Writer-Mahendrasing.

2.1 After Abdul Majid summoned the Panch witnesses, they were informed about the secret information. Police Sub-Inspector, Shri B.K. Jhala, Shri Rajput, Police Constable Bhaskar, Mahendrasing, etc. were intimated about the information given by Gopalsing and Police Constable, Abdul Majid. Thereafter, a mutual search and search of Government vehicles No.159 and 256 were conducted and no contraband was found. A preliminary Panchnama was prepared in this regard and an entry was made in the Police Station Diary. Thereafter, the team left in the vehicles towards the place in question and arranged a watch. After some time, a man was noticed walking towards them. He was identified as Jainuddin alias Dilo by Police Constable-Abdul Majid. The said person had a bag in his hand. His right hand was bandaged. When he came near to the officers, he was intercepted and was told that they are officers of Narcotic Cell and he is required to be searched for possession of contraband charas. He was asked whether he wanted to be searched in presence of a Magistrate or another Gazetted Officer, to which he denied and said that he has faith in the officers. The person was also give a Yadi in writing intimating him about this right of exercising option of being searched in presence of a

Magistrate or a Gazetted Officer. Acknowledgement from the suspect was obtained on carbon copy and signatures of Panch witnesses were also obtained. Thereafter, the person of the suspect was searched and an amount of Rs.140/- was found from the pocket of his shirt. The Khakhi cloth bag that he was carrying in his hand was heavy. It was taken from him and opened in presence of Panch witnesses. It was found to carry a plastic bag containing black coloured candle shaped pieces. On being tested, the pieces were found to carry a smell like that of charas. F.S.L. Officer was summoned. Likewise superior officer, Shri N.R. Parmar was also intimated. Police Constable-Takhtsinh was sent to bring a weighing scale, who returned with one witness, namely, Rameshbhai, with weighing scales. The said witness-Rameshbhai was explained that a quantity of contraband was seized from the suspect-accused, which is to be weighed. He, therefore, weighed the contraband and it was found to weigh 3.200 kgs. comprising of 70 candle shaped pieces. In the meantime, the Officer of F.S.L., Shri Sharma, who had arrived, took out a quantity of about 20 grams from all the pieces and undertook the tests. He opined the material to be Charas on preliminary examination. The segregated 20 grams of charas was divided into two parts of 10 grams each and out of those two parts, one part was kept as sample for analysis for being sent to F.S.L. whereas the other part was kept as reserve sample. The two samples were placed into two separate small polyethylene bags, which were heat sealed and then placed into two tins of Jafrani Patti. Thereafter, slips containing signatures of the Panch witnesses as well as the raiding officers were wrapped on the tins and tied with thread and then were wax sealed. The remaining quantity was placed into an aluminium tin after putting the same into a heat sealed polyethylene bag. The contraband was then seized and memo in this regard was prepared and handed over to the suspect. His acknowledgement was also obtained on the office copy (Mark 10/6). The suspect was asked about his having any pass or permit for possessing charas, to which he denied. A detailed Panchnama in this regard was prepared and concluded after the seizure. The accused was arrested and was given a written intimation after obtaining his acknowledgement in the form of his signature on the copy. The accused and the contraband muddamal were brought to the Police Station, i.e. Crime Branch, and an F.I.R. (Ex.16) was lodged by the raiding Officer, Mr. Barot. An entry was made in respect of this offence. Muddamal Pavti was prepared. The muddamal was handed over to Crime Writer Head, Vishnuprasad. The investigation was handed over to P.S.I. Rajput. A special report

regarding arrest and seizure was prepared and was sent to superior officers. The muddamal sample was despatched for analysis to F.S.L. Ultimately, having received the information from the F.S.L. expert that the contraband was charas, charge sheet was filed against the present appellant-accused (hereinafter referred to as "the accused"). After due formality, charge was framed against the accused at Ex.4. The accused pleaded not guilty to the charge and claimed to be tried (Ex.5).

2.2 The trial was conducted and the learned Additional City Sessions Judge, after considering the evidence on record, came to a conclusion that the prosecution could successfully establish the charges against the accused and, therefore, recorded conviction and passed the sentence of punishment, as stated above. Aggrieved by the said judgment and order, present appeal is preferred by the accused.

3. Learned Advocate, Mr. N.B. Tiwari, for the appellant submitted that the Trial Court has committed an error in appreciating the evidence on record in light of the settled legal propositions. He submitted that there are multiple defects in the prosecution case which are ignored by the Trial Court to the detriment of the accused. He submitted that there is non-compliance of requirements of Section 50 of the NDPS Act, inasmuch as, the accused was not informed of his right of exercising an option of being searched in presence of a Magistrate or another Gazetted Officer, although that option was offered to him. He submitted that, in light of the decisions of the Apex Court in the case of State of Punjab v. Baldev Singh, AIR 1999 SC 2378, Vinod v. State of Maharashtra, 2003 SCC Criminal 14 and Beckodan Abdul Rahim v. State of Kerala, 2002 SCC Criminal 791,, the suspect is required to be intimated about his right to exercise the option and mere offering the option is not sufficient.

3.1 Mr. Tiwari submitted that from a different angle also, there is noncompliance of requirement of Section 50 in the sense that the accused is a non-Gujarati, Hindi speaking person. The entire search and seizure proceedings, including offering of option was conducted in Gujarati and, therefore, for all practical purposes, there is non-compliance of Section 50 of the NDPS Act.

3.2 Mr. Tiwari submitted that the prosecution has tried to improve its case by adding in evidence that the proceedings were explained to the suspect in Hindi at the time of the search and seizure, whereas contemporaneous

material or record does not indicate that aspect and, therefore, giving of option, even if considered proper, is not sufficient so far as the accused is concerned and it amounts to non-compliance of requirement of Section 50 of the NDPS Act.

3.3 Mr. Tiwari submitted that, apart from the above defects, there is discrepancy in quantity of sample of muddamal seized and sent for analysis to the F.S.L. He has drawn attention of this Court to the fact that samples of 10 grams were drawn and sealed, one of which was sent to F.S.L. The F.S.L. receipt indicate that the sample received weighed only 3.67 grams. Mr. Tiwari, therefore, submitted that there is a loss of about 64% in the muddamal. He submitted that this indicates possibility of tampering of muddamal.

3.4 Mr. Tiwari submitted that there is a difference and discrepancy in the seal claimed to have been used by the raiding Officer. He has drawn attention of this Court to deposition of P.W.2-Mr. Barot, where he describes the seal applied on the samples. Mr. Tiwari has drawn attention of this Court to the description in the seal indicated in the F.S.L. report and demonstrated that there is discrepancy about the writings on the seal. He submitted that this also indicates tampering of muddamal. He submitted that both reduction in quantity of muddamal as well as discrepancy in the nature of seal should collectively raise sufficient doubt in the mind of the Court to give benefit of doubt to the accused. Mr. Tiwari submitted that, in light of these contentions, the Trial Court could not have recorded a conviction.

3.5 It is contended by Mr. Tiwari that witness-Abdul Majid, who gave the information and who as a member of the raiding party, had firstly identified and introduced the accused, has not been examined by the prosecution and there is discrepancy about the vocation of witness-Reameshbhai, who is claimed to have weighed the contraband as to whether he is a goldsmith or Namkeen merchant. He, therefore, urged that the appeal may be allowed and the order of conviction and sentence may be set aside. He has placed reliance on certain decisions, which shall be discussed in the paragraphs to follow.

4. Learned Additional Public Prosecutor, Mr. Pandya, has opposed this appeal. According to him, the Trial Court has considered all relevant aspects in light of the settled proposition of law. Mr. Pandya has drawn attention of this Court to Ex.43 and submitted that there was substantive compliance of Section 50 of NDPS Act.

The text of Ex.43 would indicate that the accused had followed or understood and had chosen not to exercise the option by showing faith. This means that the accused understood Gujarati language.

4.1 By way of additional submission, Mr. Pandya submitted that the accused, though a Hindi speaking non-Gujarati, is resident of Vatwa, Ahmedabad and is serving in Ahmedabad and absence of any agitation either during search and seizure or during the trial in this regard would necessarily lead to an inference that the accused knew Gujarati, though he may be a 'Hindi speaking' person.

4.2 Mr. Pandya contended that the suspect is not required to be intimated about his right of exercising option in view of the fact that, in the instant case, the search and seizure was prior to the date of the judgment of the Apex Court in the case of State of Punjab v. Baldev Singh (supra). The Officer, therefore, was not aided by the decision of the Constitution Bench and, therefore, affording an opportunity to exercise option is a substantive and sufficient compliance of Section 50.

4.3 As regards the allegation regarding tampering of muddamal, Mr. Pandya submitted that the F.S.L. expert is examined at Ex.8 and no suggestion is made regarding tampering of seal of the muddamal in question. The witness has, in terms, stated both in the report as well as in the deposition that the muddamal sample was received in an intact and sealed condition. Mr. Pandya submitted that the allegation regarding tampering of muddamal, therefore, may not be accepted.

4.4 Mr. Pandya submitted that requirements of Section 57 of the NDPS Act regarding making of report in writing to immediate superior are complied with which would make the proceedings reliable. The accused is involved in a serious offence and, therefore, the Trial Court correctly recorded the conviction, which may be confirmed.

5. We have examined the record and proceedings of the Trial Court and the evidence in light of the contentions raised.

5.1 The prosecution has examined Rajkumar Ishwardas Punjabi, at Ex.11. He was one of the Panch witnesses to the search and seizure. He states that on 21st August, 1997, he was summoned by Police at Gaekwad Haveli in the Crime Branch and was told that they have some information

regarding charas and he has joined as Panch witness. There was one person present in the office, who was called and the witness was told that this person was bringing charas and has been apprehended. Thereafter, they all went to a place near Chandola Talav along with the accused. A person was called for weighment. F.S.L. Officer was summoned. He says that he was shown the place wherefrom the accused was apprehended. Papers were prepared and signatures were obtained. Thereafter, they were taken again to the Crime Branch where pieces of charas were removed from two tins and signatures obtained. He identifies the accused as a person who was shown to him on that day as the person having brought charas. He is, with the permission of the Court, declared as a witness hostile to the prosecution and has been cross-examined by the prosecution. He denies all the suggestions made to him by the prosecution to support the procedure indicated in the Panchnama. During cross-examination to the defence, he states that the accused was handcuffed and tied with rope when they were taken to Chandola. He says that Panch No.2-Ayub was them. He denied the suggestion that he had signed on blank papers, but states that he had signed on many papers and that he does not know what was the use made by the police of those papers.

5.2 P.W.2-Tarunkumar Amratlal Barot is the raiding Officer. He was Police Inspector, D.C.B., Crime Branch on 21st August, 1997, when he received the information through Police Head Constable-Gopalsing and Police Constable-Abdul Majid that Jainuddin alias Dilo Ansari is to go to the house of Govindsinh Rajput with a quantity of charas. He says that he, therefore, asked Constable-Abdul Majid to summon Panch witnesses and intimated his superior through Confidential letter bearing Confidential No.100/97 T.A.B. He says that a mutual search of the Panch witnesses and other members of the raiding party as well as search of the vehicles was conducted and no contraband was found. A preliminary Panchnama was drawn whereafter they left for the place along with the Panch witnesses and after reaching the place, a watch was set. After about 20 minutes, a person came from Isanpur Culvert side, who was introduced as Jainuddin alias Dilo by Police Constable Abdul Majid. The said person had a bag in his hand. His right hand was bandaged. After he came near to the witness, he was intercepted and informed that they are the officers of Narcotic Cell and the suspect is to be searched for quantity of contraband charas and, therefore, if he so desired, he can be taken before a Magistrate or another Gazetted Officer and the suspect denied to exercise the

option and said that he had faith in the raiding Officer. The witness says that because the suspect was Hindi speaking, he was explained the above aspects in Hindi and a Yadi in writing was given offering option (envisaged under Section 50). The contents of the said Yadi were also explained to the suspect in Hindu and his signature was obtained on the copy. Signatures of Panch witnesses were also obtained. Thereafter, search of the person of the suspect was conducted and Rs.140/- were found from pocket of his shirt, whereas the Khakhi cloth bag that he was carrying, which was found to be heavy, was got searched and black candle shaped material was found in a plastic bag from the said Khakhi cloth bag. On being sniffed, those pieces smelt like charas. Officers from the F.S.L. were summoned and superior officer, Shri N.R. Parmar, was intimated about the incident. Police Constable-Takhtsinh was sent to bring scales, who called one Rameshbhai, working as goldsmith. Rameshbhai was informed about the incident in presence of Panch witnesses; that charas was seized from the suspect and was to be weighed and, therefore, he started weighing. In the meantime, Officer from the F.S.L. also arrived. The contraband was found to weigh 3.200 kgs. in the form of 70 candle shaped pieces. Shri Sharma from F.S.L. took out samples from each of the pieces, weighing about 20 grams and performed a test on the said quantity and, primarily, opined the material to be charas. The remainder of the 20 grams of charas divided into two parts and, separately, placed into polyethylene bags, which were heat sealed and, thereafter, placed into tins of Jafrani Patti, separately, which again was sealed with wax, after wrapping slips containing signatures of Panch witnesses as well as the raiding Officer and tying with thread, by wax seal of "P.I. NDPS Narcotic Cell". The muddamal was seized. The remaining quantity of contraband was placed in an aluminium tin, was sealed and was also seized. The accused, on being asked, disclosed that he did not have any permit to possess the material. A seizure memo was prepared and given to the accused, obtaining his signature on the copy. The Panch witnesses as well as the raiding Officer have also signed on the copy. The witness says that Police Superintendent, Shri N.R. Parmar, who was informed about this earlier, arrived while the procedure was on and he also interrogated the accused. F.S.L. Officer, Shri Sharma gave a certificate that the material tested by him was charas. A receipt was given by witness-Ramesh Nanchand certifying about his having weighed the contraband and having found the contraband to weigh 3.200 kgs. The witness says that a detailed Panchnama in this regard was drawn. The accused was arrested and was intimated about

the cause of arrest in writing. He was explained about the contents in Hindi. The witness says that, thereafter, the entire raiding party along with the Panch witnesses and the accused went to the Crime Branch where he lodged the F.I.R. (Ex.16). He himself made an entry in the Police Station Diary regarding the offence. The muddamal was handed over to the P.S.O., who, in turn, handed it over to Crime Writer Head-Vishnuprasad in a sealed condition and the investigation was entrusted to P.S.I., Rajput. A special report in this regard was prepared in the hands of Writer Constable-Mahendrasing and was sent to superior officer (Ex.17) A Ravangi Nondh was prepared for sending the muddamal to F.S.L. by Shri Rajput, where the witness signed as "Through me". The witness identifies the person apprehended and arrested as the accused before the Court. He identifies the muddamal also.

5.2.1 The witness is subjected to cross-examination. He states that, he did not inquire about the name of the informer from the police personnel, who gave him the information. The description or the age of suspect was not intimated by the informer, but his name and address were given. He says that when the information was received by the superior officer through the subordinate personnel, he was not present. He denies the suggestion that the information is, subsequently, got up. He admits that there is no outward number of the Crime Branch, but he, immediately, states that, in such information to the superior, only their personal number is given. He says that about one hour and a quarter had lapsed before they could reach the spot and has not made any arrangement for ensuring prevention of any escape of the suspect. He admits that he had not inquired about the antecedents of the Panch witnesses. He says that he had inquired from the police personnel who had informed him, as to whether they knew Jainuddin and they said that they knew him by face. The witness says that he had not recorded statement of the suspect about giving of option or explaining about the same. He also says that he had not inquired about the educational status of the suspect. He says that "gazetted" is an English word. He says that, he did not know that in U.P., Bihar and Rajasthan, Magistrates are known as Munsifs. He says that he had not used the word "Munsif" but had used the word Magistrate while offering option. He says that he had intimated the F.S.L. and they arrived in a Mobile (Laboratory). He has mentioned in the Panchnama about having intimated the F.S.L. He says that the seal remains in the custody of the office and no record is maintained. The seal of the Narcotic Cell remains with

the Narcotic Inspector and, at the time of the incident, he was the only Inspector in the Narcotic Cell. He admits that the investigation was handed over to a Police Sub-Inspector subordinate to him and the muddamal remained with him till the investigation was handed over to P.S.I. The opinion of F.S.L. was in respect of the muddamal which was sent to F.S.L. He says that the P.S.O. had not applied his separate seal. He denies the suggestion that all documents are subsequently got up and concocted. He also denies that signatures of the accused were obtained subsequently on the documents. He states that he has no idea whether muddamal weighing 3.670 gms. was sent for analysis. He denies that the accused is falsely implicated.

5.3 P.W.3-Ayubbhai Abdulbhai Shaikh is examined at Ex.18. He is the Panch witness to the raid, search and seizure. He says that, he was called at the Gaekwad Haveli on 21st August, 1997, at 15.45 hours by a person who introduced himself as Jamadar Majidbhai from Crime Branch. He enquired of the witness whether he would like to be a Panch, where a man is to come with charas. The witness says that he had agreed to that. Therefore, he was taken to Crime Branch where his signature was taken. There was another person who had also signed. The witness identifies his signature as Panch No.2. Thereafter, he says that a mutual search was conducted. Thereafter, the raiding party went to the place in police vehicles and reached Chandola. The vehicle was parked near a culvert. Thereafter, both the Panchas and other members of the raiding party, including Majidbhai, Gopalsing, etc. went on foot and arranged a watch by taking scattered positions. After about 20 minutes, a person was seen coming from a distance. He was introduced as 'the person' by Majidbhai. Thereafter, the members of the raiding party got collected and cordoned the said person. He was asked as to what is in his hands and he said that it was charas. He was told by the raiding Officer that they are from Crime Branch and that they have information that he has brought charas. He was asked, if he wants to call a higher officer for being searched, he may say so. He said no to it. He had a cloth bag in his hand with stripes over it and, on opening the same, it contained a polyethylene bag, which contained charas. The material was candle shaped. shape. On being asked, the said person said that it was charas. On being inquired, he said hat he had no permit with him. Thereafter, a man was sent to call the F.S.L. Officer. One person was sent for bringing weighing scales. The charas was weighed and it was found to be 3.200 kgs. Thereafter, the F.S.L. Van arrived. They

removed a small quantity of charas, which was placed into to two tins of "120 Tobacco". The remaining quantity of charas was placed into a big aluminium container. He says that signatures of Panch witnesses were obtained on chits which were placed in the tins as well as the aluminium container. The chits were wrapped around the small tins. Panchnama was drawn and signatures were obtained. He identifies the signatures on Panchnama (Ex.19). He says that he must have put 10 to 11 signatures. The witness identifies his signatures on the slips from the muddamal. He identifies the person from whom the muddamal was seized as the accused before the Court.

5.3.1 The witness has been cross-examined about to topography at length. The witness, during cross-examination, denies firmly that the accused was already in the Crime Branch when he was summoned and, that, thereafter, he was handcuffed and roped and was taken to Chandola as a drama. He says that he had not noticed any powder. He says that the powder was taken out from the candle shaped material and then put into the tins. If the candle shaped material was broken, it would become powder like. The slips were applied on the side of the tins. The slips were signed by both the Panch witnesses. He denies a suggestion that only one slip was prepared and put into the tin. He also denies that the slip was applied on the central portion or the top of the tin. He says that he had not seen any Khakhi coloured bag, but had seen striped bag. He says that he had witnessed the weighment. He (the weighing witness-Ramesh) had brought with him one 2 kg. weight, one 1 kg. weight and one 200 gms. weight. He says that, after signing, they had gone away. He denies the suggestion that he is favourite of the Crime Branch Police and often works as bogus Panch. He says that he has never gone to Court prior to the day of deposition. He denies the suggestion that no person was apprehended with charas in his presence.

5.4 P.W. No.4-Vishnusinh Kalusinh Chauhan (Ex.20), who was Head Constable in D.C.B., Crime Branch, at the relevant time, was on P.S.O. duty on the day of the incident. He states about his having made entries, etc.

5.5 The next witness is P.W.5-Ranchhodbhai Vashrambbhai Makwana (Ex.23). He was Crime Writer Head at the relevant time. He states to have received the muddamal after the seizure. He also states that the muddamal was sent to F.S.L. for analysis after making requisite entries.

5.6 P.W.6-Gopalsing Nathusing (Ex.27) was Police Constable with the Crime Branch on the relevant day. He is the person who, along with Abdulmajid Yasinkhan Pathan, gave information to raiding Officer. He reiterates the whole story about receiving information, calling of Panch witnesses, preparation of preliminary Panchnama, going to the raiding place, arranging a watch, intercepting the accused, giving him option of being searched in presence of another Gazetted Officer or a Magistrate, issuance of seizure memo, weighing of muddamal, sampling followed by arrest of the accused, photographs being taken, etc. He identifies the accused as well as muddamal. This witness is also cross-examined at length.

5.6.1 During cross-examination, he states that the informer was common between him and Abdul Majid. He gives description of the physical appearance of the informer. The informer had given time that the accused is likely to reach around 3.30 to 4.00 P.M. He says that he had not noted down the address or description of the informer. He states that nobody was stopped by the raiding party initially for about 20 minutes and many persons had passed by during that time. He says that he noticed the accused coming when he was at a distance of about 25 to 30 feet. In the meanwhile, mutual signals were exchanged. He admits that the accused did not make any attempt either to throw away the bag or to escape. He says that, after reaching the spot, a detailed Panchnama, i.e. Panchnama of the 2nd part was started. He gives details about the description of the muddamal. He states that photographer had come and took 10 photographs from different angles. The photographer was from the Crime Branch itself. He says that the witness who weighed the muddamal was a Namkeen merchant and not a goldsmith. During cross-examination, he states that the witness had one 100 gms., one 1 kg., one 2 kgs., one 200 gms., one 500 gms. and one 50 gms. weights. He says that he had given Chitty about the weight. He denies the suggestion that the weight of the contraband was 3.670 kgs.

5.7 The Investigating Officer, P.W.7-P.S.I., Chandansinh Naransinh Rajput, is examined at Ex.29. He was one of the members of the raiding party. He states that, on the relevant day, he was posted at D.C.B. Crime, Narcotic Cell Squad under Police Inspector-Tarun Barot. He speaks about the information being received and raid being arranged after calling Panch witnesses and preparing a preliminary Panchnama. He states that, when

the accused arrived, he was identified by Gopalsing and Abdul Majid, was intercepted and was informed about the information about the proposed search. He was given an option in Hindi that, if he so desire, his search can be arranged before another Gazetted Officer or a Magistrate and, on his saying no to it, he was intimated in writing about the proposed cause of search. Thereafter, his person was searched and Rs.140/- were found from him and in the cloth bag that he was carrying, there was contraband in the form of black coloured candle shaped material. There were about 70 pieces of the same, which smelt like charas and the suspect also said that it was charas. Thereafter, a witness was summoned to weigh the material and it was found that it weighed 3.200 kgs. F.S.L. expert, Shri Sharma, arrived and he gave a preliminary opinion about the material being charas. Two samples of 10 grams each were prepared and sealed, so also the remainder of the muddamal. He describes the procedure of sealing. He states that the Panchnama in this regard was drawn forthwith. He states that photographs were taken, superior officers were informed, F.I.R. was lodged and, thereafter, the investigation was taken over by him. He states that co-accused, Govindsinh Rajput was arrested. The muddamal was sent through Head Constable-Gopalsing Nathusing to F.S.L. and on receiving the report from the F.S.L., charge sheet was filed. This witness is also cross-examined on the procedural aspect at the Police Station and in case of investigation in a cognizable offence.

6.8 Next witness is Ms. Rajnikanta Nareshkumar Shah (Ex.35). She is the Scientific Officer-cum-Ex-officio Assistant Chemical Examiner II, Government of Gujarat, who had analysed the sample. She states that F.S.L. report (Ex.34) was prepared and issued by her. During cross-examination, she states that, if there is a difference in actual weight noticed during examination in comparison to the weight indicated in the Ravangi Nondh, a letter in that regard is written to the sender of the muddamal. She admits that in Ex.34 report, the weight of the muddamal is indicated as 3.670 grams and not 10 grams.

6.9 The last witness is Rameshbhai Nanchand Sukhadiya (Ex.36), who had weighed the contraband. He says that he runs a Namkeen business in a cart and, on the relevant day, near Isanpur Vegetable Market, police people came to him and told him that charas is to be weighed and he should accompany them with weighing scales. He, therefore, went with them with weighing scale and weights. He says that he had weighed the material which

was 3.200 kgs. He says that his signature was obtained on a paper indicating weighment, which is Ex.15. He is also cross-examined. He says that he is famous for his Chola Fali and Chatni and there is always a rush of customers. He says that he does not keep any employee. The weighment took about 15 to 20 minutes and, thereafter, he returned to his cart. He denies the suggestion that he is telling a falsehood at the behest of the police. He also denies that signature on Ex.15 was obtained on a blank paper.

7. Against the above oral evidence, relevant materials in the form of documentary evidence, which would be necessary to refer to in order to consider and appreciate the contentions raised before us are (1) Ex.43, which is an intimation given to the accused in writing about the cause of search and the option available to him; (2) Ex.42, the order under Section 42 of the Act for search; (3) Ex.41, the intimation given to superior officer, i.e. the Assistant Commissioner of Police about the information and watch being arranged; (4) Ex.33, the receipt issued by F.S.L. on receipt of the samples; (5) Ex.34, report of F.S.L.; (6) Ex.30, Ravangi Nondh sent to F.S.L. along with the muddamal; (7) Ex.19, the Panchnama; and (8) Ex.16, the F.I.R. lodged by the raiding Officer, Shri Barot.

8. With the above evidence on record, if the first contention regarding non-compliance of requirement of Section 50 of the NDPS Act is examined, at the outset, it has to be recognized and not disputed that the accused was offered an option to be searched before another Gazetted Officer or a Magistrate, which he has denied, but he was not explained of his right to exercise the option of being searched in presence of another Gazetted Officer or a Magistrate, as considered by the Constitution Bench of the Apex Court in State of Punjab v. Baldev Singh, AIR 1999 SC 2378 and it was, therefore, vehemently contended that, in light of this decision of the Apex Court, reiterated again in Vinod v. State of Maharashtra, 2003 SCC Criminal 14 and Beckodan Abdul Rahim v. State of Kerala, 2002 SCC Criminal 791, there is non-compliance of requirement of Section 50, as interpreted by the Apex Court in Baldev Singh (supra) and, therefore, the accused may be acquitted of the charges by allowing the appeal.

8.1 There cannot be any two opinion about the proposition of law settled by the Constitution Bench of the Apex Court. But, it would be equally relevant to note that the decision was rendered by the Constitution

Bench on 21st July, 1999, whereas the raid was conducted, in the instant case, prior thereto, i.e. on 21st August, 1997. The consequence of the officer only offering option of being searched in presence of another Gazetted Officer or a Magistrate and not informing the accused of his right to exercise the option of being searched in presence of another Gazetted Officer or a Magistrate will have to be examined. A similar situation was considered by a Three Judges Bench of the Apex Court in the case of Joseph Fernandez v. State of Goa, (2000) 1 SCC 707. The Apex Court observed: "It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that, 'if you wish you may be searched in presence of a gazetted officer or a Magistrate'. This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act." These observations would squarely apply to the facts of the present case and, therefore, the contention that there was non-compliance of Section 50 of the Act because the suspect was not informed of his right of being searched in presence of another Gazetted Officer or a Magistrate cannot be accepted.

8.1.1 A Full Bench of this High Court in Bhupatji Shakaraji v. State of Gujarat, 2003(2) GLR 1127 has also considered a similar situation in light of the decision rendered in K. Mohanan v. State of Kerala, (2000) 10 SCC 222, which was also relied upon by the learned advocate for the appellant herein, and observed as under:-

"13. It may be noticed here that a Larger Bench of the Supreme Court in Joseph Fernandez v. State of Goa, reported in AIR 2000 SC 3502, negatived the contention that the authorised officer should have told the person who was subjected to search that he had a right to be searched, holding that the communication to the accused that if he wished, he could be searched in the presence of a Gazetted Officer of a Magistrate, was an offer which was a communication of the information that the accused has a right to be searched. It was held that informing the accused that, 'If you wish you may be searched in the presence of Gazetted Officer

> or a Magistrate' cannot be said to be non-compliance with the mandatory provisions contained in Section 50 of the Act. The binding effect of this view of the Larger Bench in Joseph Fernandez (supra) decided on 5.10.1999 would not be affected by the observations in paragraph 6 of the judgment in K. Mohanan v. State of Kerala, reported in 2000(10) SCC 222 on which reliance was sought to be placed on behalf of the appellant."

What emerges is that, in light of this settled proposition, like in the instant case, where search is conducted prior to the decision in the case of Baldev Singh (supra), if an option is given to the suspect to get himself searched in presence of another Gazetted Officer or Magistrate, it would be substantial compliance of Section 50, not vitiating the search because of non-compliance of mandatory requirement of Section 50, as laid down in Baldev Singh's case (supra). The decisions relied upon by the learned Advocate for the appellant on lines of Baldev Singh's case cannot help the appellant in these circumstances.

8.2 The second fold of argument regarding non-compliance of Section 50 is that the accused does not know Gujarati language and the proceedings of search and seizure were conducted in Gujarati. The option of being searched in presence of another Gazetted Officer or a Magistrate given in Gujarati language, not understood by the suspect, cannot be said to be a compliance of Section 50. Reliance is placed, in this regard, on a noting made by the Court at the time of recording further statement of the accused under Section 313 of the Code of Criminal Procedure as well as while recording deposition of P.W.2-Tarunkumar Barot that since the accused is a Hindi speaking person, the questions put to him were explained to him in Hindi and the answers given by him are translated from Hindi to Gujarati and recorded while recording statement under Section 313, and that the deposition of P.W.No.2 was explained to him in Hindi. The counter argument is that the plea of the accused not knowing Gujarati language is taken for the first time before this Court. It was neither taken during the trial nor was it even argued before the Trial Court. It is indicated that, though he may be hailing from a non-Gujarati State, he is staying in Ahmedabad and is serving in Ahmedabad and, therefore, there is no reason to infer that he does not know Gujarati language. Apart from this, the officers have, in terms, stated in their

depositions that the option, etc. was explained to the accused in Hindi, which aspect has not been controverted or challenged by the defence. It is, therefore, urged that this plea may not be accepted.

8.2.1 In respect of this contention, it would be appropriate to know that the reliance placed on the noting made by the Trial Court while recording the deposition of P.W.2 and the statement of the accused under Section 313 of the Code of Criminal Procedure, only indicates that translation was made to him because the accused was found to be a Hindi speaking person. There is nothing to indicate that he does not know Gujarati language. May be thin, but a distinction between a person 'speaking Hindi' and a person speaking Hindi for want of knowledge of Gujarati has to be remembered. In the instant case, this plea is recorded at a belated stage founding the contention on the notings made by the Trial Court while recording deposition of P.W.2 and while recording further statement under Section 313. But that noting only states that the accused is a Hindi speaking person. It is clear that the Trial Court took this precaution by way of abundant caution. What is not there cannot be read, i.e. want of knowledge of Gujarati, more so, when it is undisputed that the accused is resident of Vatva and is serving with some company. It is rightly contended by learned Additional Public Prosecutor, Mr. Pandya, that during the entire trial, no plea is taken about the accused not knowing Gujarati language. It would also be relevant to note that, except at the time of recording deposition of P.W.2, no notings are made regarding translation of the deposition to the accused in Hindi while recording deposition of other witnesses. Even at the time of framing of charge also, no such objection is raised. It would also be relevant to note that, apart from all these aspects, the raiding Officer and other witnesses have, in terms, stated that the proceedings were explained to the suspect in Hindi. This aspect is not controverted and not challenged by the defence during the entire trial. The cumulative effect of the above facts situation is that this contention raised, for the first time, before this Appellate Forum appears to be an afterthought which does not merit acceptance. In our opinion, therefore, there is substantial compliance of Section 50 even on this count. There is no reason to disbelieve the raiding Officer and other witnesses who have, in terms, stated that the suspect was explained about his search and his option in Hindi. It is nobody's case that they have any animosity with the accused. They have no reason to tell a falsehood. It was contended that this aspect is not

written down in the Panchnama or the complaint. But that, by itself, will not falsify his deposition as against the conspicuous conduct of the accused during the trial of not asserting lack of knowledge of Gujarati language. Under the circumstances, we hold that there is no substance in the contention about non-compliance of requirement of Section 50 of the NDPS Act on either of the two counts.

8.3 The next contention is regarding possibility of tampering with the muddamal. In this regard, again there is a two fold argument advanced. The first is that, there is a difference in the seal applied to the muddamal. Attention is drawn of this Court to deposition of P.W.2 (Ex.13), where he says that seal of "PI NDPS Narcotic Cell" was applied. Against this, attention is drawn to the report of the F.S.L. at Ex.34, where it is stated that a tin containing seal of "PI NDPS Cell DCB Ahmedabad City" was affixed on the muddamal, which was found intact. It is, therefore, indicated that muddamal which was received was not the muddanmal which was seized and sealed at the time of drawing of Panchnama because there is a difference in the description of the seal. In this regard, it would be appropriate to refer to Ravangi Nondh (Ex.30), which carries a specimen of the seal applied on the muddamal and in that, it is indicated that the seal was of "NDPS Cell DCB Ahmedabad". There is no reason, therefore, to suspect any tampering on account of difference in the sale. In fact, this seems to be a slip on the part of the witness when he misses to state words "DCB Ahmedabad City" found in the FSL report because those words are indicated in the 'Ravangi Nondh' (Ex.30), a contemporaneous material on record.

8.3.1 The second fold of argument was that there is a difference in weight. As per the prosecution case, samples of 10 grams each were packed in small tins and one of the samples was sent to F.S.L. for analysis. Again, reliance is placed on deposition of P.W.2, who says that two samples of 10 grams each were drawn and packed and again attention is drawn to the F.S.L. report, at Ex.34, which indicates that the weight of the contraband found from the tin was 3.670 grams. It was vehemently argued that there is difference of about 65% in the sample and, therefore, the possibility of tampering cannot be ruled out. As an additional factor, it is indicated that the seizure was on 21st August, 1997, whereas the muddamal was despatched on 26th August, 1997 and, therefore, the muddamal remained with the police for five days and it could be tampered in light of the difference in weight. It is true that there is a

difference in weight, but it will have to be examined as to whether the samples were drawn after exact weighment or not or whether the weight was indicated approximately. In this regard, Ex.30, Ravangi Nondh indicates that the weight of the sample was approximately 10 grams. Likewise, the Panchnama (Ex.19) also indicates that sample was drawn on estimate. It says that approximately 10 grams were drawn and put in two separate tins. It does not speak of a specific weighment of the sample. The F.I.R. (Ex.16) also indicates that, approximately, 10 grams samples were taken. In addition to these aspects, there is deposition of witness Ramesh Nanchand Sukhadia, at Ex.36. He speaks of having weighed the gross muddamal only. He does not speak of having weighed the samples of 10 grams each. His certificate (Ex.15) indicating that he had weighed the muddamal also speaks of having weighed the gross muddamal, only weighing 3.200 kgs. This aspect has also not been controverted by the defence.

8.3.2 It is matter of record that this witness is engaged in Namkeen business and, ordinarily, it would be unreasonable to expect or assume to have precision weighing scales and weights of 10 grams and this aspect is reflected from the deposition of Gopalsing Nathusing (Ex.27), who, during cross-examination, states that the witness had brought with him one weight of 1 kg., one weight of 2 kgs., one weight of 500 grams, one weight of 200 grams, one weight of 100 grams and one weight of 50 grams. This also reflects that the witness did not have any material to weigh the muddamal samples at 10 grams each. The entire procedure was done on approximation. It is true that P.W.2 has stated that, these samples, according to him, were segregated after weighing. But this mistake or exaggeration cannot outweigh or abrogate the voluminous material discussed above to indicate that the samples were drawn on approximation. A reference can be made to decision of the Apex Court in the case of State of U.P. v. Anil Singh, AIR 1988 SC 1998, wherein the Apex Court has observed thus :-

> "15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the

> inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

Therefore, when the deposition of P.W.2 is otherwise found to be consistent and satisfactorily reliable, a slip or a little exaggeration of referring to weighment will not render his deposition unbelievable or will not render the prosecution case doubtful when it is manifestly indicated from various material that the samples were drawn on approximation and, therefore, there is bound to be difference in exact weight made by the F.S.L. expert precision weighing scales.

8.3.3 It would also be important to note that the sample was received by the F.S.L. intact with the proper seal on it. During cross-examination of any of the Police Officers, no suggestion was put that the seals on the samples were tampered and, therefore, we do not find any merit in the contention that the sample was tampered either because of difference in the weight or because of difference in the seal.

8.4 It was contended that there is non-compliance of requirement of Section 42(2) of the NDPS Act. This contention also holds no ground in light of Ex.41, where an intimation was sent to the superior about receipt of the information and watch being arranged, after drawing a preliminary Panchnama. There is deposition of P.W.2 to support this evidence and, therefore, there is no flaw so far as requirement under Section 42(2) is concerned.

8.4.1 Likewise, an intimation regarding search, seizure and arrest has also been sent to the superior by a special report (Ex.17). That contention also, therefore, cannot be accepted that there was non-compliance of Section 57.

8.5 The next contention is that Police Constable-Abdul Majid, who gave the information along with Gopalsing Nathusing (P.W.6) and who identified the accused on his arrival at the spot, has not been examined. Non-examination of Abdul Majid will not affect the prosecution case for the reason that the other

evidence independent of the evidence of Abdul Majid establishes the case against the accused to the hilt and there was no need for burdening the record by examining the witnesses to the same fact and who cannot furnish any additional material to the Court for assessing the case.

8.6 The last contention was that there is discrepancy about the vocation of the weighing witness. P.W.2 has stated that Rameshbhai Soni (Goldsmith) was summoned whereas the other witnesses have indicated that he was a Namkeen merchant. This discrepancy does not go to the root of the case when the other witnesses have consistently said that he was only a Namkeen merchant. The oral; evidence has been tested on touch stone of cross-examination to examine its veracity and has stood the test.

8.7 No other contention was raised and no other judgment was cited.

9. In view of the above discussion, we do not find any error to have been committed by the Trial Court in assessing the evidence and recording a conviction. We do not find any reason to interfere with the same.

10. Considering the quantity with which the accused is found, we do not find that the discretion is used by the Trial Court in any arbitrary manner and we do not find any reason to interfere with the punishment either. The appeal, therefore, must fail. The appeal stands dismissed. The judgment and order of conviction and sentence dated 23rd December, 1998, recorded by the learned Additional City Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No.268 of 1997, is, hereby confirmed.

[KSHITIJ R. VYAS, J.]

[A. L. DAVE, J.]

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